The learned Lord President also quoted another passage on page 15 of *Kerr* on Injunctions which reads —

"In exercising the jurisdiction, the court does not pretend to determine legal rights to property, but merely keeps the property in its actual condition until the legal title can be established. The court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the court for the protection of the property in question until the legal right can be ascertained. The office of the court to interfere being founded on the existence of the legal right, a man who seeks the aid of the court must be able to show a fair *prima facie* case in support of the title which he asserts. He is not required to make out a clear legal title, but he must satisfy the court that he has a fair question to raise as to the existence of the legal right which he sets up, and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent. The court must, before disturbing any man's legal right, or stripping him of any of the rights with which the law has clothed him, be satisfied that the probability is in favour of the case ultimately failing in the final issue of the suit. The mere existence of a doubt as to the plaintiff's right to the property, interference with which he seeks to restrain, does not of itself constitute a sufficient ground for refusing an injunction, though it is always a circumstance which calls for the attention of the court."

In exercising my discretion, I have taken into account all the facts before this court and it is my considered judgment that this application should be dismissed with costs.

Application dismissed.

Solicitors: *Skrine & Co.; Chin & Fernandez*

LEE KAH HONG & ANOR. v. TEOH TIANG GUAN & ANOR.

[O.C.J. (Syed Agil Barakbah J.) July 17, 1971]

[Alor Star — Civil Suit No. 236 of 1968]

Practice and Procedure — Writ of summons — Enlargement of time for renewal of writ — Application for — Discretion of court — R.S.C. 1957, O. 8 r. 1.

Limitation — Writ of summons — Omission to serve on party to action — Application for enlargement of time for renewal of writ — Plea of limitation — Benefit accrued before application was made — Civil Law Ordinance, 1956, s. 7(5).

The plaintiffs filed a writ of summons on October 22, 1968, as administrators of the estate of one Chew Eang Huat (deceased), against the first defendant as the driver and/or servant or agent of the then second defendant, and against the latter as the registered owner of the motor van involved in an accident which led to the death of the deceased. The claim was for damages for loss of expectation of life and loss of support under sections 7 and 8 of the Civil Law Ordinance, 1956. The writ was served on the first defendant but not on the second defendant. On November 4, 1970, an *ex parte* application was made by the plaintiffs for enlargement of time and renewal of the said writ for a period of six months and for the appointment of the official administrator, Malaysia, to represent the estate of the second defendant (since deceased), and to act in his capacity as the duly appointed representative of the estate of the said deceased in place of the second defendant. The application was allowed in terms by the assistant registrar of the High Court, Alor Star, *vide* an order made on November 10, 1970.

It was because of this order that the present application was made by the official administrator, Malaysia, as second defendant, for an order that the writ of summons, accompanied by the statement of claim and the service thereof, be set aside for irregularity on the grounds that: (a) the writ of summons was issued against Teoh See Seng, the then second defendant, when he was already dead; and/or (b) that the renewal of the writ would deprive the second defendant of the benefit of a plea of limitation that had accrued.

The main question which arose was whether the court should exercise its discretion to enlarge the time for renewal of the writ in the circumstances (a) when the period of twelve months under R.S.C. 1957 O. 8 r. 1 had expired; and (b) when the plea of limitation or lapse of time under section 7(5) of the Civil Law Ordinance, 1956, had already accrued.

Held: the discretion to renew the writ and enlarge the time would not be exercised in the plaintiffs' favour as to do otherwise would deprive the second defendant of the benefit of a limitation which had accrued well before the application for extension was made.

Cases referred to:-

(1) *The Firm of T.AR.CT.* v. *The Firm of S.N.S.AR.N.* [1954] M.L.J. 72.

(2) *Holman* v. *George Elliot & Co. Ltd.* [1944] 1 All E.R. 639.

(3) *Battersby & Ors.* v. *Anglo-American Oil Co. Ltd. & Ors.* [1944] 2 All E.R. 387.

(4) *Sheldon* v. *Brown Bayley's Steelworks, Ltd. & Anor.* [1953] 2 All E.R. 894.

(5) *E. Ltd.* v. *C. & Anor.* [1959] 2 All E.R. 468.

CIVIL SUIT.

M.C.P. Tan (Miss) for the applicant/second defendant.

Tan Lye Huat for the respondents/plaintiffs.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an application by the Official Administrator, Malaysia, the second defendant in the suit, for an order that the writ of summons accompanied by the statement of claim and the service thereof and all proceedings subsequent to the issue of the writ be set aside for irregularity on the grounds that: -

(a) The writ of summons was issued against Teoh See Seng, the then second defendant, when he was already dead; and/or

(b) That the removal of the writ would deprive the second defendant of the benefit of a plea of limitation that had accrued.

The plaintiffs filed a writ on 22nd October, 1968, as administrators of the estate of one Chew Eang Huat alias Chow Min Kong (deceased) for and on behalf of the said estate and its beneficiaries against the first defendant as the driver and/or servant or agent of the then second defendant and against the latter as the registered owner respectively of a motor van No. PA.8858 which was involved in an accident that led to the death of the deceased. The claim was for damages for loss of expectation of life and loss of support under sections 7 and 8 of the Civil Law Ordinance, 1956, and that the accident was caused by the negligent driving of the first defendant of the said motor van at about 7.30 p.m. on 27th February, 1966, at the 32nd milestone, Bedong/Sungei Patani Road, Kedah.

The writ of summons was served on the first defendant but not on the second defendant. On

4th November, 1970, an *ex parte* application was made by the plaintiffs for enlargement of time and renewal of the said writ for a period of six months and for the appointment of the Official Administrator, Malaysia, to represent the estate of the second defendant (since deceased), and to act in his capacity as the duly appointed representative of the estate of the said deceased in place of the second defendant. The application was allowed in terms by the assistant registrar of the High Court, Alor Star, *vide* an order made on 10th November, 1970. It is because of this order that the application to set aside the writ is made. The defendant through his solicitors filed a conditional appearance on 13th January, 1971.

The facts relevant to the issue are as follows: -

The deceased died on 27th February, 1966. The writ was issued on 22nd October, 1968, which was within the three-year limitation under section 7(5) of the Civil Law Ordinance, 1956.

The then second defendant died on 4th December, 1966, before the writ was issued. It was not then within the knowledge of the plaintiffs that the second defendant had died. The plaintiffs came to know of his death from the report of the process server when the writ was sent for service. Thereafter the plaintiffs through their solicitors had to make investigations to confirm the second defendant's death. They communicated with the Registrar and Inspector of Motor Vehicles to ascertain the registered owner of the motor vehicle and made inquiries as to whether any grant of probate or letters of administration of the deceased's estate had been applied for and on finding no trace, communicated with the assistant official assignee, Kedah, inquiring whether he was prepared to consent to act as the personal representative or administrator of the second defendant's estate. Subsequently, there was protracted correspondence between the official administrator, Malaysia, with the plaintiffs' solicitors and finally after much persuasion such consent was obtained. Necessary funds had to be provided to cover statutory fees and expenses and a letter of indemnity was given to the official administrator against all claims and costs arising out of the said suit. About one and a half years had passed before the final consent was obtained and at the time when the three-year limitation lapsed on 26th February, 1969, negotiations with the official administrator were still in progress. In other words, the writ of summons was issued within the limitation period under section 7(5) of the Civil Law Ordinance but was not served on the deceased (second defendant) within the twelve months allowed for service by the Rules of the Supreme Court. When the *ex parte* application for renewal and extension was made by the plaintiffs and an order accordingly obtained from the registrar, both the three-year limitation and the twelve months period had already lapsed.

The application was first heard in chambers when it was dismissed with costs but subsequently on an application by counsel for the second defendant, under Order 54 rule 22A of the Rules of the Supreme Court, further argument was heard in open court.

As regards the first ground, it was submitted by Miss Monica Tan for the second defendant that since Teoh See Seng, the then second defendant, was already dead when the writ was issued and his estate was not represented until 10th November, 1970, when the official administrator was so appointed, the writ was a nullity. Section 8 of the Civil Law Ordinance provides that on the death of any person all causes of action subsisting against him shall survive against his estate. In a way I am inclined to agree with her but as the facts show the plaintiffs have taken the necessary steps to remedy the situation as soon as they came to know of his death, although there was considerable delay in doing so. In the circumstances, I do not think this ground is vital to the issue.

The main question that arises for consideration therefore is whether this court should exercise its discretion to enlarge the time for renewal of the writ in the circumstances (a) when the period of twelve months under Order 8 rule 1 has expired; and (b) when the plea of limitation of lapse of time under section 7(5) of the Civil Law Ordinance, 1956, has already accrued.

A similar question was decided by the Court of Appeal in *The Firm of T. AR. CT.* v. *The Firm of S.N.S.AR.N.*[1] This was a case concerning a loan of money payable on demand. A specially indorsed writ was served on the defendants after it had expired. The defendants entered a conditional appearance without prejudice to set aside the said writ and the service thereof. The plaintiffs applied *ex parte* for renewal of the writ for a period of six months and that the time for the making of the application be enlarged. An order giving effect to this application was made but later set aside on the ground that it was not served after the expiration of twelve months from the date of the said writ. Further, the claim was statute barred prior to that date under the Limitation Ordinance. Buhagiar, J. in the court of first instance was faced with the conflicting decisions of the Court of Appeal in England in *Holman* v. *George Elliot & Co. Ltd.*,[2] and *Battersby & Others* v. *Anglo-American Oil Co. Ltd. & Others*,[3] and he followed the latter decision. It was upheld by a full Court of Appeal. Mathew, C.J. (as he then was) at page 74, said as follows: -

".... So soon as the question of limitation was raised, the judge hearing the application had to consider whether the renewal of the writ and the enlargement of time would have the effect of depriving the defendants of a statutory defence. He applied the principles laid down in *Battersby* v. *Anglo-American Oil Co. Ltd.*, and came to the conclusion, rightly in my view, that he should exercise his discretion not to renew the writ and enlarge the time, as to do otherwise would deprive the defendants of a legal defence."

Mr. Tan Lye Huat cited *Sheldon* v. *Brown Bayley's Steelworks, Ltd. & Anor.*,[4] a later decision of the Court of Appeal in England which differs from that of *Battersby's* case. It was held that failure to serve the writ within the prescribed time did not render it a nullity but an irregularity which had been waived by the defendant's unconditional appearance and therefore service of the writ would not be set aside. There is a difference in the instant case in that the second defendant entered a conditional appearance. It should be noted in *Sheldon's* case too the first defendant entered a conditional appearance and

successfully applied to have service of writ on them set aside. I do not think the question whether the writ is a nullity or an irregularity in that it has not been served within twelve months under Order 8 rule 1 arises in the present case. The question is whether the court would exercise the discretion to renew the writ when the renewal would deprive a defendant of the benefit of a limitation which has accrued. Singleton, L.J. in *Sheldon's* case in his judgment said at page 895: -

"It has been held over a long period of years that this rule (O. 64 r. 7 R.S.C.) enables the court to renew a writ even though application is not made until after the expiration of the twelve months laid down in O. 8, r. 1. The court will not normally exercise its discretion in favour of the renewal of a writ after the period of service has expired if the effect of doing so will be to deprive a defendant of the benefit of a limitation which has accrued."

The principle of course differs from that *Battersby's* case. However, in the light of the passage underlined above, it makes no difference to the present case. As I have said earlier, it is almost on all fours with *Battersby's* case and I refer to the proposition of the Court of Appeal by Lord Goddard at page 391 which has not received any criticism from any court. (See *E. Ltd. v. C. & Anor.*,[5] at page 470): -

"We conclude by saying that even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction (given by O. 64 r. 7) ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course, on an application which is necessarily made *ex parte*. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as indeed, is laid down in the order. ..... But ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried, or to await some future development."

Mr. Tan also pointed out that the delay of one and a half years was due to the negotiations with the official administrator, Malaysia, for the purpose of representation as explained earlier. Although he was aware that the time for service of the writ and the limitation period had run out when negotiations were still going on, he had no other alternative. To the suggestion by Miss Tan, he replied that he could not drop the second defendant out as he was the owner of the motor van and employer of the first defendant. Further his correspondence with the official administrator were marked "urgent" in order to impress on the latter the urgency of the matter.

The grounds submitted above, to my mind, are not sufficiently adequate as a good reason. The learned counsel was aware of the limited period during which the writ had to be served and I think it was his duty to bring to the attention of the official administrator the true circumstances of the case. Merely to put the word "urgent" in his correspondence while waiting for the official administrator's consent is, I think, not enough. Further, the application for renewal was made out of time.

In the circumstances, I should therefore exercise my discretion not to renew the writ and enlarge the time as to do otherwise would deprive the defendant of the benefit of a limitation which had accrued well before the application for extension was made.

I therefore set aside my order made in chambers on 6th June, 1971, and make an order in terms of the application with costs.

Application granted.

Solicitors: *Allen & Gledhill; Tan Lye Huat.*

CHONG KUENG YING & ORS. v. LOVIS LAVAGNA

[O.C.J. (Syed Agil Barakbah J.) August 6, 1971]

[Seremban — Civil Suit No. 63 of 1968]

Practice and Procedure — Judgment — Application to set aside — Applicants, aggrieved strangers — Leave to enter appearance — R.S.C. 1957, O. 13 r. 10, O. 27 r. 15 and O. 54 r. 22.

This was an application by way of summons in chambers under O.13 r.10 and O.27 r.15 of the Rules of the Supreme Court, 1957, to set aside the interlocutory judgment in default entered against the defendants on October 1, 1969, and all subsequent proceedings thereafter, and for leave to enter an appearance and to defend the plaintiffs' claim in the action for and in the name of the defendant. The application was subsequently adjourned for argument in open court under O.54 r.22.

The applicants are an insurance company with whom the defendant insured his motor-car. The said motor-car was involved in an accident with another car which resulted in the death of the driver of the other vehicle. On April 4, 1968, the plaintiffs who were the widow and children of the deceased, filed a writ of summons against the defendant which was not served on him for want of his whereabouts. Ultimately, it was discovered that the defendant was in England, and so on December 31, 1968, the plaintiffs applied for the issue of a concurrent writ to be served out of jurisdiction by A.R. registered post, such service to be deemed good and sufficient service. An order was made on January 27, 1969, and the time for entering appearance was substituted for the period of fifty days inclusive of the day of service.

The A.R. card subsequently returned as acknowledged but the defendant did not enter appearance after the lapse of the fixed period. Thereafter interlocutory judgment in default of appearance was made against the defendant for negligence.

Held: Order 27 rule 15 gives a completely unfettered discretion to a court to set aside a judgment in default. The applicants, though strangers to the action, are entitled to an order setting aside the judgment and be given leave to enter appearance in the action in the name of the defendant or in their own name and to deliver a defence on the ground that they are persons aggrieved by the judgment in the action. In the circumstances of this case, there were merits which showed that the applicants had a *prima facie* defence.

Cases referred to:-

(1) *Leong Han* v. *Kupusamy* [1959] M.L.J. 95.

(2) *Re application of Asia Insurance Co. Ltd.; Osman* v. *Tan Swee Liang* [1968] 2 M.L.J. 228 at p. 229.

(3) *Jacques* v. *Harrison* [1883] 12 Q.B.D. 136.

(4) *Windsor* v. *Chalcraft* [1938] 2 All E.R. 751.

(5) *The South British Insurance Co. Ltd.* v. *Haji Ismail; Sin Kek Yeow, Intervener* [1964] M.L.J. 16.